

IN THE SUPREME COURT OF THE STATE OF MONTANA  
NO. DA 09-0322

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PLAINS GRAINS LIMITED PARTNERSHIP, )  
a Montana limited partnership; )  
PLAINS GRAINS INC., a Montana corporation; )  
ROBERT E. LASSILA and EARLYNE A. )  
LASSILA; KEVIN D. LASSILA and )  
STEFFANI J. LASSILA; KERRY ANN )  
(LASSILA) FRASER; DARYL E. LASSILA )  
and LINDA K. LASSILA; DOROTHY LASSILA; )  
DAN LASSILA; NANCY LASSILA )  
BIRTWISTLE; CHRISTOPHER LASSILA; )  
JOSEPH W. KANTOLA and MYRNA R. )  
KANTOLA; KENT HOLTZ; HOTLZ FARMS, )  
INC., a Montana corporation; MEADOWLARK )  
FARMS, a Montana partnership; JON C. )  
KANTOROWICZ and CHARLOTTE )  
KANTOROWICZ; JAMES FELDMAN and )  
COURTNEY FELDMAN; DAVID P. ROEHM )  
and CLAIRE M. ROEHM; DENNIS N. WARD )  
and LaLONNIE WARD; JANNY KINION-MAY; )  
C LAZY J RANCH; CHARLES BUMGARNER )  
and KARLA BUMGARNER; CARL W. )  
MEHMKE and MARTHA MEHMKE; WALTER )  
MEHMKE and ROBIN MEHMKE; LOUISIANA )  
LAND & LIVESTOCK, LLC., a limited liability )  
corporation; GWIN FAMILY TRUST, )  
U/A DATED SEPTEMBER 20, 1991; )  
FORDER LAND & CATTLE CO.; WAYNE W. )  
FORDER and DOROTHY FORDER; )  
CONN FORDER and JEANINE FORDER; )  
ROBERT E. VIHINEN and PENNIE VIHINEN; )  
VIOLET VIHINEN; ROBERT E. VIHINEN, )  
TRUSTEE OF ELMER VIHINEN TRUST; )  
JAYBE D. FLOYD and MICHAEL E. LUCKETT; )  
TRUSTEES OF THE JAYBE D. FLOYD LIVING )  
TRUST; ROBERT M. COLEMAN and HELEN )  
A. COLEMAN; GARY OWEN and KAY OWEN; )

RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; MICHAEL E. HOY; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Appellants,

vs.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Appellees.

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Appellees/Cross-Appellants.

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On appeal from the Montana Eighth Judicial District Court  
Cause No. BDV-08-480  
Honorable E. Wayne Phillips Presiding

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**PETITION FOR REHEARING**

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## **INTRODUCTION**

On Friday, July 16, 2010 the Majority, in a sharply split 4-3 decision, created startling new jurisprudence in Montana.

For starters, some 50,000 rural electricity consumers may find within a year, their lights dimmed for lack of sufficient supply for their Co-Op, which is their sole source.

Legally, the 4-3 opinion turns decades of precedent regarding mootness directly on its head. The effect of the opinion also blurs the separation of powers between the Court, the legislature, local government control, and administrative agencies, creating chilling constitutional consequences.

As shown in this brief, the 4-3 opinion is based on critically incorrect facts and ignores stark failures of the Appellants to follow the rules regarding due process.

This Court, by reconsidering and reversal can restore both precedent and rights that have wrongly been taken.

## **LEGAL STANDARD FOR PETITION FOR REHEARING**

SME brings this Petition pursuant to Mont.R.App.P. 20, which provides:

- (a) The Supreme Court will consider a petition for rehearing presented only upon the following grounds:
  - (i) That it overlooked some fact material to the decision;
  - (ii) That it overlooked some question presented by counsel

that would have proven decisive to the case; or

- (iii) That its decision conflicts with a statute or controlling decision not addressed by the Supreme Court.

## ARGUMENT

### A. **The Majority decision conflicts with the Statute of Limitations controlling the time to appeal the 2009 county-wide rezone.**

The Majority allows Plains to prevail on a time-barred claim. Plains *never* filed a legal challenge to the 2009 county-wide rezone, nor did anyone else. Nonetheless, the Majority upholds Plains’ challenge to the **2009** county-wide rezone on the basis of its objection to the **2008** rezone. (Op.¶¶ 30- 34). This deprives SME and Cascade County of their right to due process to defend the 2009 county-wide rezoning pursuant to the established appeal process. *See* SME Supp. Br.10 (“The issue of whether the 2009 county-wide rezoning by Cascade County was valid is not before the Court. . .”); *see also* County Supp. Br.1-2 (“The County’s new zoning regulations and map and the process followed to adopt them have not been challenged . . .”).

The Court cited MCA § 76-2-201(1)(b) the statute of limitations applicable to the 2009 county-wide rezone. But the Court never addressed SME’s argument in the second motion to dismiss: that because the **2009** county-wide rezone was never timely challenged, the **2009** rezone stands and the appeal is moot. The Court instead mistakenly analyzed the **2009** county-wide rezoning statute of limitations

in terms of the **2008** rezoning: “Plains Grains timely challenged, however, the creation of the 668 acre I-2 zoning district in **2008**.” (Op.¶30 (emphasis added)).

Rehearing should be granted on this basis alone.

**B. The Majority overlooked facts material to its decision regarding spot zoning.**

The 2009 county-wide rezone ratified the 2008 rezone. In its supplemental brief SME stated the general rule that a comprehensive rezoning is “ . . . universally considered a legislative act entitled to broad judicial deference.” SME Supp. Br.1 (*citing* Ziegler, Jr., *The Law of Zoning and Planning*, 38:14). Because the Court misapplied material facts on this dispositive issue, and failed to apply the proper legal standard, the Petition should be granted and the decision reversed.

Rather than following applicable law, the Court chastised the county for adopting the 2008 rezone in the 2009 county-wide plan. The Majority incorrectly assumed (without citation to the record) that Cascade County was unaware that its prior rezoning of the 668 acres remained intact in the 2009 rezoning. (Op.¶¶19, 22-29). It was not possible for the Majority to support this erroneous conclusion, however, because no factual record was developed in a proper appeal of the 2009 rezone. Furthermore, SME and Cascade County never had the opportunity, consistent with substantive due process, to defend an attack on the 2009 county-wide rezoning.

In particular, the Court incorrectly found that the 2009 county-wide rezone

and the 2008 rezone were incompatible, stating “[t]he 2009 amendments focus on issues unrelated to the 2008 rezone” (Op.¶29), when in fact both the 2008 rezoning and the 2009 county-wide rezoning shared the same objective of providing greater diversity of uses in the county. *See* Binder 10 100017-19 (County Agenda Action Report (Jan. 10, 2008)); Trans. of Oral Argument (Ex. A) 27:12-28:14.

The Court further erred by limiting its reasoning to two facts, namely “changes to regulations dealing with ‘hoofed animals’ on residential lots and setbacks for wind turbines.” (Op.¶29). Again, the record does not support this finding because there were a litany of objectives for the 2009 rezoning, many of which were consistent with the 2008 rezone. *See* County Supp. Br.2-3, Ex. A-1, A-2; Trans. Oral Argument 27:8-28:14.

**C. The Decision on Plains’ spot zoning claim misstates and overlooks material facts in the record.**

In finding for Plains on spot zoning, the Court ruled:

The District Court found that “one landowner (be it viewed as either SME, the current deed holder, or the Urquharts, the applicants) will benefit at the expense of the others.” The court recognized that these costs constituted “not merely the location of a power plant in the ‘Back 40’ but the power lines, rail spurs, and other industrial detritus of a large, power generating facility.” The court acknowledged that the impacts of this special legislation would be “imposed on some landowners by way of eminent domain.” We agree. No discernible benefit for the rezone would accrue the neighboring farmers and ranchers. The benefits of the rezone inure solely to the owners of the 668 acres, first the Urquharts and now SME.

(Op.¶65).

The errors in this analysis warrant reconsideration and reversal. Clearly, in arriving at this conclusion, the Court relied on the district court's findings, *made before the project changed from coal to natural gas*. Consequently, the majority overlooked material facts in the record regarding the change in natural resources for electric generation, and the resulting material changes in the project.

The record reflects significant differences between the two facilities, including size, scope, and required infrastructure. Critically, a natural gas plant will not require a rail spur or related right of way acquisition. SME Supp. Br.4, 6. Moreover, the project is no longer a "large power generating facility" on a 668 acre tract, but reduced from a 250 MW to 120 MW facility on a fraction of the required land area (with estimated "footprint" of less than 20 acres). *See* SME Motion to Dismiss for Mootness (Aug. 25, 2009); Trans. Oral Argument (Ex. A); Affidavit of Timothy R. Gregori (July 27, 2010) ¶14.

In sum, by relying on out-dated facts from the district court's decision, the majority's spot zoning analysis was flawed and based on inaccurate facts that are material to the majority's erroneous decision. The majority decision also overlooked facts material to allegations of "special legislation". Had the Court considered such facts, it would have come to the conclusion that the County's 2008 rezoning was not "special legislation".

First, in finding that the 2008 rezoning did not benefit the surrounding landowners, the majority failed to consider the eleven conditions the county adopted to address the concerns the surrounding landowners raised during the rezoning process. (*See Op.*¶11). For example, neighbors will benefit from better roads (SME is required to maintain Salem Road and improve Highwood Road). Binder 10 100012-13 (County Agenda Action Report (Jan. 10, 2008)). Second, since the City of Great Falls is a member of SME, the neighboring landowners, who obviously avail themselves of certain city services (*e.g.*, public swimming pools, street lights, civic center), will benefit from the rezone. SME Reply Br.2; Trans. Oral Argument 43:18-22. Third, the increased tax base will benefit all county residents and the project will offer employment opportunities for county residents. Binder 9 090852-090854, Binder 11 110094-110095 (Test. of City Mgr. J. Lawton, public hearings); Binder 10 100008 (Agenda Action Report). Finally, about 50,000 Montanans will be served by SME's power generating facility. Trans. Oral Argument 43:18-22.

Although the Court concludes that the proposed rezone “smacks of ‘special legislation,’” (*Op.*¶66), the record does not support this finding. Consequently, the Court fails to cite any facts from the record to support its conclusion that there was a “deal” between Cascade County and SME.

**D. . Materially changed circumstances moot the appeal.**

Considering the substantial sums of money spent, status of permitting, construction on site, and other project components, there are “changed circumstances” which mooted Plains’ appeal. In analyzing this issue, the Court simply misses a number of key, material facts, including the following:

- “The 668 acre parcel remains intact.” (Op.¶43). This is not true. The property was re-surveyed in February, 2010 and divided into two separate tracts. Gregori Aff.¶20.
- “The ‘damage’ that Plains Grains seeks to avoid has not already been done.” (Op.¶46). This is not accurate. *See generally* Gregori (2008) Aff. (Ex. E, SME Brief Opposing Request for Writs (filed Oct. 21, 2008)). In the fall of 2008, SME commenced construction on site under applicable permits. It performed grading work, dug an ash pit, and started building concrete foundations for the cooling tower and equipment - steps required for SME to timely commence construction under its Air Quality Permit for the coal plant. *See* Gregori (2010) Aff.¶11. More recently, the plant’s natural gas supplier has laid more than 10 miles of gas pipeline to the site, and SME has awarded construction bids and ordered large equipment needed for the plant. *See id.*¶¶19, 21. Since November, 2008, SME moved forward in securing additional permits for the facility and keeping in place its large generator interconnection agreement. *See id.*¶¶17, 20, 23. The Court

was advised at oral argument that SME had spent millions of dollars in connection with development of the plant. *See* Trans. 44:19-45:3. As of June 30, 2010, SME had spent more than \$62 million dollars in connection with such development. *See* Gregori Aff. ¶22.

- “It seems far from clear, however, that SME possessed the necessary permits that would have given it the legal right to develop the property . . .” (Op. ¶46). “SME had not yet obtained its final air quality permit that would allow it to construct the proposed HGS at the time the parties submitted their briefs on appeal.” (Op. ¶48). Both observations are untrue. At the material times SME had a Location/Conformance Permit from Cascade County. *See* Gregori Aff. ¶¶10, 20. Furthermore, SME’s Air Quality Permit for a coal plant was final in November, 2008 (*see id.* ¶9) and its Air Quality Permit for a natural gas plant was final in November, 2009, prior to oral argument. *Id.* ¶17. It was a matter of public record ***and the Court was advised that the air permit for the gas plant was final and non-appealable.*** *See* Trans. Oral Argument 45:24-46:8.

- “More importantly, DEQ forced SME to halt its premature earthmoving and site preparation due to the fact that SME had not yet obtained a permit for this activity. DEQ issued a Notice of Violation to SME.” (Op. ¶47). The Notice of Violation was dismissed, *sua sponte*, by DEQ in late 2008 (Trans. Oral Argument 45:24-46:7) and SME was proceeding, with all necessary permits, when

the Court's decision was rendered July 16, 2010. *See* Gregori Aff. ¶¶18-21.

The foregoing inaccurate facts material to the majority's decision mandate rehearing pursuant to M.R.App.P. 20.

**E. The decision violated SME's fundamental constitutional rights.**

It is a mistake of constitutional magnitude for the majority to condone the failure of Plains to seek a stay or injunction or challenge the County's 2009 rezoning during the appeal process. The decision completely undercuts certainty associated with rezoning in Montana because the *prevailing party* must wait until the appeals process, which can span years, is finally concluded. The *prevailing party's* other option is to act in accordance with the rezoning - at its peril - and risk suffering what in many cases, like this one, will be insurmountable damages. The majority's decision deprives the *prevailing party* of its due process rights to act pursuant to successful rezoning or seek security for the consequences of delay during an appeal. Amazingly, the losing party now has the legal right to force the prevailing party into this Hobson's choice *by doing absolutely nothing*.

The constitutional significance of these arguments were raised and thoroughly briefed by SME as follows:

It is contrary to basic notions of due process and equal protection to imply or express that a developer should not proceed with a permitted project when the opponents have failed to move for a stay on multiple occasions. SME Supp. Br.8.

. . . the Constitution does not guarantee a day in court without posting

a bond for damages, nor does it subordinate the rights of another private party, Southern Montana, to suffer damage without bond by the multiple appeals of Plains Grains without ever requesting a stay. . . Plains Grains never moved for a stay . . . The Constitution protects Southern Montana's rights of equal protection, due process and remedies for damages just as it protects Plains Grains. . . The law of Montana has always provided for protection via a bond if a litigant sought a prejudgment stay or prejudgment attachments. *See e.g.*, 27-18-10, M.C.A., *et seq.* (requiring a bond for prejudgment attachment) and 27-19-101, M.C.A., *et seq.* (requiring a bond for an injunction). SME Opening Br.25-26; *see also* SME Reply Br.14-15.

The Majority's failure to recognize SME's fundamental rights under the United States and Montana Constitutions casts uncertainty in constitutional analysis and jurisprudence in Montana. These are fatal flaws in the decision which violate the constitutional rights to due process and equal protection. Under the majority's reasoning, every homeowner, farmer, rancher, business owner, builder and developer in this state is put at risk of suffering catastrophic results should they decide to pursue a change in land use. The decision makes it clear the Achilles heel of any development is the local land use decision. By simply filing an appeal, opponents of any land use change are free, without material cost or consequence, to delay the use approved by the local governing body until the proposed use is no longer viable.

### **Conclusion**

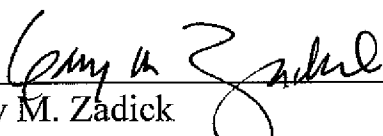
We respectfully implore this Court to step back, reconsider, and reverse its July 16, 2010 Opinion. We believe that is the right and just result which will

restore proper precedent. Based on the Majority decision, Montanans pursuing developments (and their financiers, title insurers and potential investors), who are progressing with full and proper permits from state, county and local governmental authorities are left twisting in the winds of uncertainty. Zoning authorities are likewise left in uncertainty, and Montana's established mootness jurisprudence is rendered extinct.

We submit that, if left standing, this 4-3 decision will chill development not only of energy projects, but perhaps all infrastructure projects in Montana. While agriculture is a time-honored use of Montana lands, it is not and cannot be the *only* use entitled to protection and to due process guaranteed under the United States and Montana Constitutions. Indeed, most of Montana's smaller cities are "islands" within large areas of agricultural land. (Op.¶61).

DATED this 29<sup>th</sup> day of July, 2010.

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DATED this 29<sup>th</sup> day of July, 2010.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 20 of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 2,500 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 29th day of July, 2010.

A handwritten signature in dark ink, appearing to read "Mary K. Jaraczski", is written over a horizontal line.

Gary M. Zadick

Mary K. Jaraczski

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

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